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SURFACE TRANSPORTATION BOARD

ORDER OF ADMINISTRATIVE LAW JUDGE CLARIFYING PRIOR ORDER ON MOTION TO COMPEL DISCOVERY RESPONSES

Docket No. FD 35981

FINCH PAPER LLC—PETITION FOR DECLARATORY ORDER

Decided: January 18, 2017

Finch Paper LLC (Finch) filed a motion to compel discovery responses from Delaware and Hudson Railway Company d/b/a Canadian Pacific (CP) on July 1, 2016. Specifically, the motion sought to compel full CP responses to Document Request No. 30 included in Finch's February 18, 2016 First Set of Discovery Requests, as well as to Interrogatory Nos. 15, 16, 17, 18, 19 and Document Request Nos. 40, 41, 42 and 44 included in Finch's April 11, 2016 Second Set of Discovery Requests. CP objected to the discovery requests on three bases: (1) the requests were untimely; (2) the requested documents and information were irrelevant; and (3) the requests were unduly burdensome.

After careful review of each of the disputed discovery requests, the Finch motion and the CP reply in opposition, in conjunction with applicable standards for determining timeliness, relevance and undue burden, I issued an order granting the Finch motion in its entirety on August 24, 2016 (August 24, 2016 Order). CP appealed that order to the Board on September 13, 2016. The Board remanded the matter to me by decision issued January 11, 2017, stating it could not "sufficiently discern the basis for the ALJ's ruling based on the level of detail contained in the written decision." January 11, 2017 Decision at 6. This clarifying order is intended to provide the Board with detail it found lacking in the August 24, 2016 Order.

The disputed discovery requests, the Finch motion and the CP reply in opposition clearly defined the discovery dispute(s) between Finch and CP. I therefore determined as a threshold matter there was no need to further tax Finch and CP resources by requiring them to present redundant oral argument concerning the disputed discovery requests.[1] In my view, the circumstance that neither Finch nor CP requested oral argument—either in the original motion/reply or in any subsequent pleading or other communication—further confirmed this determination.

Insofar as timeliness was concerned, I underscored that in accepting the Finch motion to compel, the Board's August 16, 2016 Decision specifically relied on Board determinations that

[1] FERC ALJs are required to rule on motions to compel discovery responses in almost every hearing case, and routinely do so "on the papers"—i.e. in exclusive reliance on the pleadings, without recourse to oral argument.

(i) discovery was ongoing throughout the relevant period and (ii) resolution of the underlying discovery dispute should not unduly delay the proceeding. I concluded by extension that any CP objection that the discovery requests underlying the motion to compel were untimely was inconsistent with these Board determinations. If the motion to compel was deemed timely, the underlying discovery requests must be deemed timely as well. Moreover, I do not consider it within my delegated authority to ignore pertinent Board determinations—particularly when they (i) were made in the same order delegating that authority and (ii) authorize me to rule only on "pending" (i.e. yet to be resolved) discovery matters and to resolve "future" discovery disputes. *See* August 15, 2016 Decision at 2. I therefore considered the prior Board determinations with respect to timeliness to be dispositive.

CP's reply in opposition objected to the discovery requests at issue on two substantive bases: (1) the requested documents and information were irrelevant; and (2) the requests were unduly burdensome. As a consequence, I evaluated the disputed discovery requests exclusively on those bases.[2]

I first observed Board regulations permit discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding. . . ."[3] This is a very liberal standard, as the sole "not privileged" exception makes clear. It permits discovery concerning any material "relevant to the subject matter involved in [the] proceeding." "[R]elevant", in turn, is itself a broad standard. My review of Board regulations revealed no definition for the term. I therefore defaulted to the Federal Rules of Evidence (FRE)—a practice customarily adopted among administrative agencies—including FERC.[4] Consistent with the FRE definition of "relevant", I interpreted Board regulations to permit Finch to request from CP any information or document(s) having any tendency to make any fact of consequence to the Board's final determination in this proceeding more or less probable than it would be without the information or document(s). I carefully evaluated each of the discovery requests at issue in accordance with

[2] While the CP reply also suggested certain requested safety audit materials "*may* contain information about CP's other rail customers' facilities that those customers *might* consider to be competition sensitive()" (CP reply at 7 (emphasis added)), CP provided absolutely no support for this speculation. I therefore accorded it no weight/did not address it.

[3] *See* 49 C.F.R. § 1114.21(a)(1) (2016). This standard is virtually identical to the standard I apply to resolve FERC discovery disputes. *Compare id. with* 18 C.F.R. § 385.402(a) (2016).

[4] I paraphrased/adopted the FRE Rule 401 definition. While default to Federal Rules of Civil Procedure (FRCP) also is common practice among administrative agencies (including FERC), and reliance on a discovery-specific FRCP definition might have been preferable, those rules reference—but do not define—the term "relevant". *See, e.g.*, Fed. R. Civ. P. 26(b)(1). Moreover, the circumstance that FRE Rule 401 generally addresses admissibility is of no consequence insofar as the definition of "relevant" evidence itself is concerned.

that broad standard, and concluded each request clearly satisfied it.[5] I did/do not consider it necessary to detail those evaluations in narrative. I presume(d) the Board has confidence its designated decision-makers will conduct appropriate comparative analyses in this regard. *Accord* 49 C.F.R. § 1114.31(a)(4) (2016) (Board regulation expressly contemplating summary rulings on motions to compel discovery in stand-alone cost and simplified standards rate cases).

Most concerning among CP's undue burden objections was its claim that Finch's Second Set of Discovery Requests required CP to conduct a costly and burdensome "special study" because CP did not maintain the requested information in the form Finch requested it. *See* CP reply at 11. Discovery obligations generally require responsive information to be provided only to the extent and in the form it is customarily maintained by the responding party. They do not require the responding party to conduct any "special study" to compile information not customarily maintained by the responding party or to provide information customarily maintained by the responding party in a different form than the responding party customarily maintains it. Since I had determined the CP customer audit/transit reports covered by Finch's Second Set of Discovery Requests satisfied the "relevant" standard, I determined CP was required to provide any responsive material CP already might have "in whatever form CP has the information/documents." I also specifically ruled "CP (was) not required to conduct any special study to satisfy the requests. . . ." Thus, any CP claim that Finch's Second Set of Discovery Requests were unduly burdensome because they required CP to conduct a costly and burdensome "special study" was untenable.

In evaluating CP's other undue burden claims, I accepted CP's position that "(u)nder 49 CFR 1114.21(c), discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought." CP reply at 10 (citation omitted)). But the only support CP provided for its contention that the burden of producing the requested information outweighed its likely value was CP opinion that the bare *volume* of information CP already had provided was "sufficient . . . to answer the referred matters before the Board." *Id*. at 11. This argument suffered a number of fundamental flaws in my view: (1) it conflated volume with probative value; (2) it otherwise completely failed to address probative value; and (3) it substituted CP opinion for a considered Board determination with respect to whether the Board already had sufficient information to decide this case.[6] In sum, CP offered nothing of substance to balance against Finch's right to discovery.

Discovery always imposes a burden—often significant—on the responding party. The pertinent standard in the context of a motion to compel is whether the discovery requests at issue impose an *undue* burden on the responding party. CP failed to satisfy this standard under its own interpretation of 49 C.F.R. § 1114.21(c) (2016).

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[5] CP's relevance objections were primarily directed to the *scope* of the information requested rather than its potential to make any fact of consequence to the Board's final determination in the proceeding more or less probable than it would be without the information.

[6] And with respect to point (3), I inferred the Board would not have permitted discovery to continue in this proceeding—let alone refer the motion to compel to an ALJ for resolution—if it already had determined it had sufficient information to decide the case.

It is ordered:

1. The August 24, 2016 Order is clarified as discussed above.

2. This decision is effective on its date of service.

By the Board, H. Peter Young, Administrative Law Judge.